MT. BETHER BIBLE CENTER, INC.

IBLA 87-731 Decided October 6, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving land for conveyance to Native regional corporation. AA-14015.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests--Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally

BLM properly declines to make a conveyance to a Native regional corporation subject to special use permits where the permits have either expired by their own terms or provide that they will terminate prior to conveyance to the corporation, as such permits cannot be considered valid existing rights at the time of conveyance within the meaning of sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982).

APPEARANCES: Michael J. O'Connell, Mt. Bether Bible Center, Inc., for appellant; Stephen F. Sorensen, Esq., Juneau, Alaska, for Sealaska Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Mt. Bether Bible Center, Inc. (Mt. Bether), has appealed from a deci-sion of the Alaska State Office, Bureau of Land Management (BLM), dated July 16, 1987, approving approximately 82.37 acres of land for conveyance to the Sealaska Corporation (Sealaska), a Native regional corporation.

In its July 1987 decision, BLM approved the surface and subsurface estates of 12,663 acres of land, including the land involved herein, within the Tongass National Forest for conveyance to Sealaska, subject to valid existing rights, including certain third-party interests. That land had been selected by Sealaska pursuant to section 14(h)(8) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(8) (1982).

Of concern to Mt. Bether is that BLM specifically provided that two special use permits issued to Mt. Bether by the Forest Service (FS), U.S. Department of Agriculture, "on December 4, 1981 and October 27, 1983" for a tabernacle, outbuildings, emergency shelter and trails "shall terminate according to the terms and conditions of the permits on the date of con-veyance," to the extent that they were situated in unsurveyed sec. 5, T. 44 S., R. 61 E., Copper River Meridian, Alaska (Decision at 6). Mt. Bether's appeal challenges this portion of the decision, contending that the conveyance to Sealaska should be made subject to its special use permits, as was the case with seven other third-party interests, six of which were created after issuance of the original permit to Mt. Bether. 1/ Mt. Bether concludes:

> [W]e respectfully submit that, if the other Special Use Per-mits, etc., be allowed to stand, then ours should be allowed to stand as well and not succumb merely because of a change in the law which caused the termination clause to be added to our Permit, whereas we have not substantially changed our need to use this land for easement, access, log storage and use of the buildings * * *.

In response to Mt. Bether's appeal, BLM contends that Mt. Bether's special use permits are distinguished from the seven third-party interests to which the conveyance to Sealaska was made subject because, at the time of issuance of the permits, Mt. Bether's interests contained a clause which provided that the permits would terminate upon conveyance of the underlying land to a Native corporation. Accordingly, BLM argues that it properly concluded that the permits would terminate upon conveyance of the land to Sealaska and, thus, did not provide that the conveyance to Sealaska would be subject to the permits.

By order dated September 18, 1987, the Board, pursuant to a request by Sealaska and BLM, segregated the approximately 82.37 acres of land subject to Mt. Bether's appeal and remanded jurisdiction over the remaining land approved for conveyance to Sealaska to BLM so that it might proceed with the conveyance. The land over which the Board retained jurisdiction is described as lots 1 and 2 of U.S. Survey No. 2439, containing 7.37 acres,
and the W\ of fractional sec. 5, T. 44 S., R. 61 E., Copper River Meridian, Alaska, excluding U.S. Survey Nos. 1353, 1354, 2152 and 2439, containing approximately 75 acres.

1/ In its July 1987 decision, BLM provided that the conveyance to Sealaska would be "subject to" some third-party interests created by FS and listed seven such interests: a timber sale contract awarded to the Alaska Lumber and Pulp Company (Alaska Lumber) on Jan. 25, 1956; a June 10, 1982, road right-of-way construction and use agreement between the United States and the Huna Totem Corporation (Huna Totem); a Jan. 25, 1984, road maintenance agreement between the United States and Huna Totem; a June 10, 1982, memorandum of agreement between the Forest Service and Sealaska; two special use permits issued to Alaska Lumber on Aug. 17 and 18, 1982; and a special use permit issued to the City of Hoonah on Mar. 26, 1984.

[1] Conveyances to a Native regional corporation pursuant to sec-tion 14(h)(8) of ANCSA are governed by section 14(g) of ANCSA, as amended, 43 U.S.C. § 1613(g) (1982), which provides generally that such conveyances "shall be subject to valid existing rights." That section then specifically provides: "Where, prior to patent of any land or minerals under this chap-ter, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement * * *." 43 U.S.C. § 1613(g) (1982). Such third-party interests, where created by the State or Federal Government prior to patent, are generally deemed to be protected as "valid existing rights." See 43 CFR 2650.3-1(a); Ukpeagvik Inupiat Corp., 81 IBLA 222, 230 (1984); Ketchikan Public Utilities, 79 IBLA 286, 293 (1984); Theodore J. Almasy, 4 ANCAB 151, 160 and 162, 87 I.D. 81, 85 (1980).

BLM maintains, however, that the conveyance to Sealaska provided for in the July 1987 BLM decision need not be made subject to the special use per-mits issued to Mt. Bether because they contain a clause which provides for their termination upon conveyance of the underlying land to a Native corporation. We agree that, since Mt. Bether's interests had either already terminated as of the date of BLM's decision or were certain to terminate prior to conveyance to Sealaska, BLM was not required to recognize the interests as valid existing rights.

Along with its answer, BLM has submitted copies of pertinent portions of the special use permits that have been issued to Mt. Bether by FS. On December 4, 1981, FS issued a special use permit to Mt. Bether for the purpose of maintaining a tabernacle and outbuildings. That permit provided that it would expire on August 1, 1986. There is no indication that it was ever extended.

On October 27, 1983, FS issued a special use permit to Mt. Bether for the purposes of constructing and maintaining an emergency shelter and using trails from the nearby beach to the shelter. The emergency shelter was to be located in sec. 7, T. 44 S., R. 61 E., Copper River Meridian, Alaska, and would be accessed by two trails which would cross lots 1 and 2 of U.S. Survey No. 2439 and the W\ of sec. 5, T. 44 S., R. 61 E., Copper River Meridian, Alaska, which had been selected by Sealaska. The permit provided that it would expire on December 31, 1988. In addition, the permit provided in condition No. 25: "Should this permit fall within the boundaries of a present or future State or Native claims selection area, this permit shall terminate on the date the selection receives tentative approval, interim conveyance, or patent to the State of Alaska, a native or a native corporation." 2/ (Emphasis supplied.)

2/ FS had also issued a special use permit to Mt. Bether (apparently then known as the Mt. Bether Bible Group) for the purpose of maintaining a tabernacle and outbuildings on Aug. 1, 1980. That permit expired by its terms on Aug. 1, 1981.

The December 1981 special use permit, by its own terms, expired prior to BLM's decision to convey. Thus, at the time of conveyance, it did not constitute a valid existing right, and BLM properly determined not to recognize the grant to Sealaska as being subject to it. Further, in the absence of any indication from the parties that FS extended it, it would appear that the October 1983 permit also expired as of December 31, 1988. Thus, there remains no interest from this permit that could be recognized as a valid existing right in any patent to Sealaska.

To the extent question of the validity of the October 1983 permit might not be mooted by the apparent expiration of its term in December 1988, we shall examine the effect of the termination clause it contains. The termi-nation clause, quoted above, provides that the permits issued to Mt. Bether will terminate no later than the date of patent to a Native corporation. 3/ Such termination operates pursuant to the contractual provisions of the permit and apart from the operation of section 14(g) of ANCSA or any other statute.

Since, by these terms, termination of Mt. Bether's special use permit was bound to occur prior to the conveyance to the Native corporation, BLM properly concluded that Mt. Bether held no valid existing right which must be protected in the patent. At the time the patent issued, any such permit right would be extinguished by its own terms, and thus could create no cognizable valid existing right. John F. Thein, 4 ANCAB 116, 126, 87 I.D. 1, 5-6 (1980); Kodiak Island Setnetters Assoc., 3 ANCAB 1, 6, 85 I.D. 200, 204 (1978).

We can find no justification for the statement in Mt. Bether's state-ment of reasons for its appeal that a "change in the law * * * caused the termination clause to be added to our Permit." Mt. Bether has not identified the "change in the law" to which it refers, and we can find none. In addition, as BLM points out, termination clauses were not "added to," but, rather, had been a part of all of Mt. Bether's special use permits since they were first issued. Moreover, Mt. Bether has made no effort to demonstrate that the clauses are for any reason void or otherwise without effect.

Finally, it is clear that Mt. Bether's special use permits are dis-tinguished from the seven third-party interests to which the conveyance to Sealaska was expressly made subject in the July 1987 BLM decision. In its Answer at page 3, BLM states that "[a] review of the administrative record will show that the underlying permits, contracts, etc., establishing those other third party rights do not contain a termination clause like Mt. Bether's permits contain." Mt. Bether does not dispute this statement, and our review of the record confirms that none of the third-party interests to which the conveyance to Sealaska was made subject by the July 1987 BLM decision contained a clause providing that the interest would terminate upon

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3/ The termination clause also provides that the interest might terminate on the date the selection receives tentative approval or interim conveyance, which would be earlier than issuance of patent.

approval of the underlying land for conveyance to a Native corporation. 4/ Nor is there any other basis evident for concluding that these interests would not otherwise be valid existing rights at the time of conveyance of the subject land to Sealaska. Where such interests were created by the Federal Government prior to the patent of the underlying land to Sealaska and remain valid, BLM was required to expressly make the conveyance subject to these interests. See State of Alaska, 5 ANCAB 307, 322, 88 I.D. 629, 635 (1981).

Accordingly, we conclude that BLM, in its July 1987 decision, properly did not include in the list of those third-party interests to which the conveyance of land to Sealaska would be subject the December 1981 and October 1983 special use permits issued by FS to Mt. Bether.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

4/ We note, however, that, in the case of the special use permits issued to Alaska Lumber, the permits provided that they would terminate upon the tentative approval of a pertinent state selection and, in the case of the special use permit issued to the City of Hoonah, the permit provided that FS would cease to have responsibility for administration of the permit upon the tentative approval for transfer or patent to the State, a Native or a Native corporation. Unlike the provisions in Mt. Bether's permits, neither of these provisions actually terminated the permits at the time of conveyance to Sealaska and, thus, there appears no reason that BLM could not consider the interests "valid existing rights" and protect them under section 14(g) of ANCSA.